UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FRANKLIN MIEULI,

Plaintiff,

v.

EDWARD J. DEBARTOLO, JR., ET AL.,

Defendants.
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No. C-00-3225 JCS

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE, TO STRIKE ALLEGATIONS AND CLAIMS PURSUANT TO FED. R. CIV. P. 12(b)(6) AND/OR 12(f)

Defendant's Motion To Dismiss Or In The Alternative, To Strike Allegations And Claims Pursuant To Fed. R. Civ. P. 12(b)(6) And/Or 12(f) ("the Motion") came on for hearing on March 30, 2001 at 9:30 a.m. Following the hearing, the parties submitted supplemental briefs. For the reasons stated below, Defendant's Motion is GRANTED in part and DENIED in part.

I. INTRODUCTION

Plaintiff Frank Mieuli is a limited partner of the San Francisco Forty-Niners Limited ("the Partnership"), a California limited partnership. Mieuli is suing Edward J. DeBartolo Jr. based upon news reports that DeBartolo is transferring his interest in the San Francisco Forty-Niners to his sister, Denise DeBartolo York. Mieuli alleges that DeBartolo has breached both a Letter Agreement and the Limited Partnership Agreement. He claims that DeBartolo failed to honor a tag-along provision in those agreements requiring that: 1) DeBartolo give Mieuli advance notice of DeBartolo's intent to sell his interest in the Forty-Niners; and 2) Mieuli be given the opportunity to sell his interest in the Forty-Niners to the same buyer and on the same terms.

Mieuli also brings claims alleging that DeBartolo, as the de facto general partner of the limited partnership, has mismanaged partnership assets and engaged in conversion and self-dealing. Those claims are at issue in this Motion. In his First Amended Complaint, Mieuli's mismanagement claims were brought on his own behalf and as derivative claims on behalf of the partnership. The Court ruled in its January 17, 2001 Order that Plaintiff had failed to meet the pleading requirements under Fed.R.Civ. P. 23.1 for the derivative claims, and allowed Plaintiff to amend his Complaint. In his Second Amended Complaint, Plaintiff dropped the derivative claims, and alleged the individual claims based on the mismanagement, conversion, and self-dealing allegations only as an individual. DeBartolo argues in this Motion that these claims may only be brought on behalf of the partnership as derivative claims and therefore, that Plaintiff's allegations and claims of mismanagement should be either struck or dismissed.

II. BACKGROUND[1]

On March 15, 1977, DeBartolo and the former owners of the San Francisco Forty-Niners signed a Memorandum of Purchase and Sale ("Memorandum") under which DeBartolo, "or a California Corporation to be formed of which DeBartolo shall be sole shareholder," agreed to purchase 90% of the assets of the Forty-Niners. Plaintiff and the Morabito family trusts each agreed to transfer and contribute their 5% interest in the team to a limited partnership to be formed by DeBartolo to operate the team. Second Amended Complaint ("SAC") at 2; *see also* Memorandum at 1, ¶ 2, Exh. A to Declaration of Peter Obstler in Support of Defendant Edward DeBartolo, Jr.'s Motion to Dismiss Complaint for Failure to State Claims Pursuant to Fed. R. Civ. P. 12(b)(6) ("Obstler Decl."). The Memorandum provided that a more detailed formal agreement governing the

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[1] The facts set forth in this section are based on the allegations in Plaintiff's Second Amended Complaint, which are assumed to be true for the purposes of this Motion. *See During v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987). The Court also relies upon the following documents, which were explicitly referenced in Plaintiff's Second Amended Complaint ("SAC"): 1) the March 15, 1977 Letter Agreement (referenced in SAC at 2, ¶ 5); 2) the March 15, 1977 Memorandum of Purchase and Sale (referenced in SAC at 2, ¶ 4); 3) the March 25, 1977 Limited Partnership Agreement (referenced in SAC at 3, ¶ 9). *See Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) ("documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered on a Rule 12(b)(6) motion").

terms of the purchase and sale would be signed in the future. Memorandum at 6, ¶ 14. On the same day, DeBartolo and Mieuli signed a letter agreement setting forth the terms of their agreement "in connection with the limited partnership to be formed for the purposes of purchasing and operating the San Francisco 49ers football team." March 15, 1977 Letter Agreement ("the Letter Agreement"), Exh. B to Obstler Decl. The Letter Agreement gave Mieuli "tag-along" rights in the event that DeBartolo decided to sell his interest in the Forty-Niners. Specifically, the Letter Agreement contained the following provisions:

> 7. DeBartolo shall give Mieuli formal written notice of his intent to sell his partnership interest in San Francisco 49ers, Limited. . . .
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> 8. If DeBartolo, at any time, sells all of his interest in the San Francisco 49ers, Limited, Mieuli may, but need not, sell all of his interest in the San Francisco 49ers, Limited to the same purchaser and on the same terms and conditions.

Id. at 4. The Letter Agreement also provided that all of the provisions in the Agreement would be binding on "the heirs, personal representatives, successors and assigns of DeBartolo and Mieuli, including, but not limited to, any corporation that acquires any interest in San Francisco 49ers, Limited." *Id*. at 5.

At approximately the same time that DeBartolo signed the Letter Agreement, he formed a corporation, San Francisco Forty-Niners, Inc. ("S.F., Inc.") and transferred his entire ownership interest in the team to S.F., Inc. SAC at 2, ¶ 7. As a result, under the formal Agreement of Purchase and Sale, signed on March 25, 1977, the buyer was S.F., Inc. rather than DeBartolo. Agreement for the Purchase and Sale of Certain Assets and Assumption of Certain Liabilities and Obligations of San Francisco 49ers at 20-21, ¶ 12, Exh. C to Obstler Decl. On March 25, 1977, the parties also signed the Limited Partnership Agreement ("the Partnership Agreement") creating San Francisco Forty-Niners, Limited. *See* San Francisco Forty-Niners, Limited: Limited Partnership Agreement, Exh. D to Obstler Decl. Under the Partnership Agreement, the parties contributed their respective ownership interests in the team to the Partnership. In exchange, S.F., Inc. was to have a 90% interest in the Partnership and function as the general partner, while Plaintiff and Morabito were to retain a 5% interest each and act as limited partners.

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According to the SAC, Plaintiff learned from news reports published around March 18, 2000, that DeBartolo had contracted for the sale of his interest in the Partnership. SAC at 5.

On May 19, 2000, Plaintiff filed a Complaint against DeBartolo in state court. *See* Exh. A to Notice of Removal. DeBartolo removed to the United States District Court for the Northern District of California on September 6, 2000.[2] Plaintiff filed a First Amended Complaint on October 30, 2000. In that Complaint, Plaintiff alleged the following claims:

Claim One: Breach of Letter Agreement

Claim Two: Breach of Limited Partnership Agreement

Claim Three: Breach of Fiduciary Duty

Claim Four: Derivative Claim for Breach of Fiduciary Duty

Claim Five: Derivative Claim for Conversion of Partnership Assets

Claim Six: Derivative Claim for an Accounting

Claim Seven: Derivative Claim for Unjust Enrichment

Claim Eight: Violation of Business and Professions Code Section 17200

This Court held in its January 17, 2001 Order that Plaintiff failed to meet the pleading requirements of Fed. R.Civ.P. 23.1 for derivative claims and on that basis dismissed Claims Four through Seven with leave to amend. Plaintiff filed a Second Amended Complaint on January 25, 2001.

In Plaintiff's SAC, he did not replead his derivative claims to comply with Rule 23.1 but instead, dropped his derivative claims. In his SAC, Plaintiff alleges the following claims:

Claim One: Breach of Letter Agreement

Claim Two: Breach of Limited Partnership Agreement

Claim Three: Breach of Fiduciary Duty

Claim Four: Claim for an Accounting

Claim Five: Violation of Business and Professions Code Section 17200

Plaintiff's claim for breach of the Partnership Agreement (Claim Two) is based on two theories. First, he alleges that DeBartolo failed to honor his tag-along rights. SAC at 6, ¶ 25.

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[2] Although the state court action was filed on May 19, 2000, removal was timely because valid service of the Complaint was not effected until August 9, 2000.

According to Plaintiff, this breach of the Partnership Agreement damaged him by "depriving him of the opportunity to sell his interest in the Partnership on . . . highly attractive terms." SAC at 6, ¶ 26. Second, Plaintiff alleges that DeBartolo breached the Partnership Agreement by "causing the Partnership to provide monetary and other compensation to him and various entities he owned and controlled without obtaining Plaintiff's agreement." SAC at 6, ¶ 25. This breach of the Partnership Agreement damaged Plaintiff by "draining funds from the partnership so that there were no funds available to distribute to plaintiff." SAC at 6, ¶ 26.

Similarly, Plaintiff's claim for breach of fiduciary duty (Claim Three) is based on two theories. First, he alleges that DeBartolo breached a fiduciary duty to Plaintiff by "violating Plaintiff's [tag-along] rights under the Letter Agreement and the Partnership Agreement." SAC at 7, ¶ 30. According to Plaintiff, this breach of fiduciary duty damaged him by "depriving him of the opportunity to sell his interest in the partnership on . . . highly favorable terms."

Second, Plaintiff alleges that DeBartolo violated his fiduciary duty to Mieuli by "converting the Partnership's funds and by engaging in other acts of mismanagement and self-dealing described herein." SAC at 6-7. The latter theory is based upon the factual allegations contained in the section of the SAC entitled "DeBartolo's and the Corporation's Mismanagement of the Partnership." SAC at 4, ¶ 11-14.[3] According to Plaintiff, these acts of mismanagement damaged him by "depriving him

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[3] In this section, Plaintiff alleges as follows:

> 11. Prior to the time DeBartolo took control of the Team, it had consistently shown a profit and made distributions to plaintiff and the other owners. In the twenty-four years since DeBartolo became the de facto general partner of the Partnership, not one revenue distribution has been made to Plaintiff, despite the fact that the Team's revenues have grown dramatically during that time, as have the revenues of most NFL teams. DeBartolo explained the lack of distributions by claiming that the Team was not profitable.
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> 12. Even though they claimed the Partnership was losing money, DeBartolo and the Corporation caused it to pay large sums to DeBartolo for "management" services. On information and belief, DeBartolo also regularly used Partnership assets and funds for his own personal benefit and for the benefit of other entities he owned or controlled.
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> 13. DeBartolo and the Corporation also caused the Partnership to direct other valuable benefits to DeBartolo and to entities he owned or controlled. For instance, they caused the Partnership to borrow money at interest rates of twelve to eighteen percent and then loan money to DeBartolo at seven percent. DeBartolo and the Corporation also caused the Partnership to execute lucrative contracts with entities they owned or controlled for airplane usage, engineering and construction services, computer processing and maintenance services, and other services.

of partnership distributions over the past twenty-four years [and] reducing the value of his interest in the Partnership."

Plaintiff's claim for an accounting (Claim Four) is identical except in name to the derivative claim for an accounting contained in the First Amended Complaint (Claim Six). Similarly, Plaintiff's claim under the California Business and Professions Code (Claim Five) is identical to Claim Eight of his First Amended Complaint.

In this Motion, Defendant asserts that Plaintiff's allegations of mismanagement, self-dealing and conversion are derivative and cannot be asserted as individual causes of action because the injury alleged is to the Partnership and only incidentally to Plaintiff. On this basis, Defendant argues, the allegations of mismanagement, conversion and self-dealing in Claims Two and Three should be struck from the Complaint because Plaintiff has not met the pleading requirements for derivative claims under Rule 23.1. Further, Defendant asserts, Plaintiff's claim for an accounting (Claim Four) should be struck or dismissed for two reasons. First, the claim for an accounting must be dismissed because the underlying claims on which it is based may only be brought as derivative claims and Plaintiff has not satisfied the pleading requirements for derivative claims. Second, to the extent that the claim for an accounting is predicated on Plaintiff's alleged tag-along rights, Plaintiff is not entitled to such an accounting because it appears from the face of the Complaint that an accounting is not necessary. In particular, if Defendant breached Plaintiff's tag-along rights, Plaintiff is merely entitled to sell his interest in the Partnership on the same terms as Defendant. Finally, Defendant asserts that Plaintiff's claim for violations of the California Business and Professions Code should be struck to the extent that it is based on claims of mismanagement, conversion and self-dealing as Plaintiff may not bring these claims as an individual.

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14. In violation of the Limited Partnership Agreement, DeBartolo and the Corporation neither sought nor obtained the agreement of plaintiff or, on information and belief, the Morabito trusts before causing the Partnership to make the expenditures and confer the benefits alleged in the preceding two paragraphs.

SAC at 4, ¶ 11-14.

In his Opposition, Plaintiff makes the following arguments. First, with respect to his claim for breach of the Partnership Agreement (Claim Two), Plaintiff argues that his mismanagement allegations are based on explicit provisions in the Partnership Agreement and therefore, that he is entitled to bring an individual claim for breach of contract on this basis. Second, with respect to Plaintiff's claim for breach of fiduciary duty (Claim Three), Plaintiff asserts that California Corporations Code § 16405(b) and California case law allow limited partners to bring such claims against general partners either on their own behalf or on behalf of the partnership. Third, Plaintiff asserts that he may bring a claim for an accounting both because his underlying mismanagement claims may be brought on an individual basis and because California law allows a partner to sue for an accounting.

In his Reply, Defendant asserts that Plaintiff fails to reach the main issue raised by the Motion, that is, whether or not Plaintiff's mismanagement claims are based on injuries to the Partnership (in which case the claims would be derivative) or on some special injury to Plaintiff (which would allow Plaintiff to bring the claims on his own behalf). Defendant also asserts that Plaintiff's reliance on California Corporations Code § 16405(b) is inappropriate because that section applies only to general partnerships.

Following the hearing, the parties submitted supplemental briefs addressing the question of whether California Corporations Code § 16405(b) allows Plaintiff to sue Defendant individually.

III. ANALYSIS

A. Individual vs. Derivative Claims

Defendant asserts that Plaintiff does not have standing to pursue claims based on mismanagement, conversion and self-dealing individually because these claims may only be asserted as derivative claims. In the absence of any California cases that directly address the distinction between individual and derivative claims in the context of limited partnership, Defendant relies on two lines of cases. First, Defendant points to cases applying California law regarding shareholder claims in the corporate context. Second, Defendant points to non-California authority in which courts, drawing on corporate law, have held that claims of mismanagement by limited partners must be brought as derivative claims. Plaintiff, on the other hand, argues that California law allows limited partners to bring both derivative claims and direct claims, regardless of the nature of the injury on which the claims are based. Plaintiff also asserts that California case law governing shareholder claims does not apply here because the scope of the duties of a general partner to limited partners is broader under California law than the scope of the duties owed by majority shareholders to minority shareholders.

1. California Corporate Law Governing Shareholder Actions

In determining under California law whether a shareholder action is individual or derivative, "the pivotal question is whether the injury is incidental to or an indirect result of a direct injury to the corporation or to the whole body of its stock or property." *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) (citing *Jones v. Ahmanson & Co.*, 1 Cal. 3d 93, 106-107 (1969)). In *Pareto*, the Ninth Circuit applied California law to shareholder claims of breach of the duty of due care and loyalty against the corporation's former directors. There, the plaintiffs were shareholders who alleged that the former directors of the corporation had misrepresented certain features of a merger that ultimately failed in order to induce the shareholder's approval "in pursuit of [the directors'] own undisclosed personal gain." *Id*. at 698. The court held that the plaintiffs could only bring these claims as derivative claims because the plaintiffs did not allege an injury that was separate and distinct from the injury to the value of the corporation's stock and property. *Id*. at 699. The court suggested that the shareholders might have alleged an individual injury, however if they had alleged that the breach of fiduciary duty had "resulted in the majority stockholders retaining a disproportionate share of the corporation's ongoing value." *Id*. at 699-700 (citing to *Smith v. Tele-Communication, Inc.*, 134 Cal. App. 3d 338 (1982); *Crain v. Electronic Memories & Magnetics Corp.* 50 Cal. App. 3d 509, 520-522 (1975); *Jones*, 1 Cal. 3d at 107).

Defendant also relies on *Nelson v. Anderson*, 72 Cal. App. 4th 111, 125-126 (1999). In *Nelson*, the court, applying California law, held that a minority shareholder's claim for breach of fiduciary duty against a majority shareholder based on allegations of mismanagement of the corporation's affairs could only be brought as a derivative claim because the injury was to the corporation. The court stated: "Because all of the acts alleged to have caused [the plaintiff's] injury amount to alleged misfeasance or negligence in managing the corporation's business, causing the business to be a total failure, any obligations so violated were duties owed directly and immediately to the corporation." *Id*.

In *Nelson*, the plaintiff was 25% shareholder in a corporation with Loni Anderson, who held 75% of the corporation's shares. *Id*. at 118. The corporation was formed for the purpose of marketing a line of skin care products but the venture was a failure. *Id*. at 121. The plaintiff sued Anderson for breach of fiduciary duty, pointing to actions by Anderson that the plaintiff alleged had resulted in the failure of the business. *Id*. A jury found that Anderson had breached her fiduciary duty as a majority shareholder to the plaintiff and Anderson appealed. *Id*. at 122. On appeal, Anderson argued that the plaintiff had no individual cause of action for breach of fiduciary duty because her "allegations of improper management decisions, causing her to lose her investment and prospective profits, amount[ed] to an injury to the corporation, not to Nelson individually." *Id*. at 124. The court agreed, stating that:

> The cause of action is individual, not derivative, only where it appears that the injury resulted from the violation of some special duty owed the stockholder by the wrongdoer and having its origins in circumstances independent of the plaintiff's status as a shareholder. . . . While we agree that in some cases, the same facts regarding injury to the corporation may underlie a personal cause of action, such as intentional infliction of emotional distress, breach of contract, fraud or defamation, [the plaintiff] has not alleged or proved the elements of any such cause of action.

Id. at 124-125.

2. Cases Applying Principles Governing Shareholder Actions To Claims By Limited Partners

Defendant asserts that the same reasoning as was applied in *Nelson* and *Pareto* with respect to shareholder actions applies to Plaintiff's allegations of mismanagement, self-dealing and conversion in this action. Plaintiff points to cases from numerous jurisdictions in which courts have drawn on the law governing shareholder actions in determining whether actions by limited partners are derivative or individual. *See, e.g., Litman v. Prudential-Bache Properties, Inc.*, 611 A.2d 12 (Del. Ch. 1992); *Lenz. v. Associated Inns & Restaurants Co. of America*, 833 F. Supp. 362, 368, 378

(S.D.N.Y. 1993) (drawing on corporate law and holding that claims by limited partner against general partners for breach of fiduciary duty, conversion and negligence based on allegations that general partners had "milk[ed] the resources of the Limited Partnership for the benefit of defendants' other projects" were derivative claims and could not be brought by limited shareholder individually); *Energy Investor's Fund LP v. Metric Constructors, Inc.*, 525 S.E. 2d 441, 444 (N.C. 2000)(drawing on corporate law and holding that claim by limited partner against general partner for negligent management of partnership project could only be brought as a derivative claim); *The Northern Trust Co. v. VIII South Michigan Associates*, 657 N.E. 2d 1095 (Ill. App. Ct. 1995) (drawing on corporate law and holding that limited partners could not sue third party for alleged fraud resulting in loss of investment because the injury was to the partnership and only incidentally to the limited partners); *Partnership Equities Inc. v. Marten,* 443 N.E. 2d 134, 137-138 (Mass. Ct. App. 1982) (drawing on corporate law and holding that limited partners could bring claims of mismanagement, negligence and diversion of assets by general partners only as derivative claims); *Strain v. Seven Hills Assoc., LP*, 429 N.Y.S. 2d 424, 431-432 (N.Y. App. Div. 1980) (drawing on corporate law and holding that limited partner who brought breach of fiduciary duty claim against general partner was required to bring claim as derivative claim where limited partner alleged that general partner had managed partnership property to benefit a corporation in which general partner was the controlling shareholder, resulting in foreclosure on the partnership property).

In *Litman*, a group of limited partners in a limited partnership sued the general partners for breach of fiduciary duty. They alleged that the general partners had inadequately investigated and monitored investments, resulting in diminished income to the partnership and a diminished value of the stock shares. *Id*. at 15-16. The court held that the limited partners could only bring their fiduciary duty claim as a derivative claim. *Id*. at 16-17. The court based its holding on corporate case law, noting at the outset that because the duties of a general partner and a director are very similar, "the determination of whether a fiduciary duty lawsuit is derivative or direct is substantially the same for corporate cases as it is for limited partnership cases." *Id*. at 15. Drawing from the corporate case law, the court articulated the following rule for derivative and individual actions:

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> The distinction between derivative and individual actions rests upon the party being directly injured by the alleged wrongdoing. . . . In a derivative suit, a shareholder sues on behalf of the corporation for harm done to the corporation. . . . On the other hand, a shareholder may bring a direct action for injuries done to him in his individual capacity if he has an injury which is separate and distinct from that suffered by other shareholders, or a wrong involving a contractual right of a shareholder, such as the right to vote, or to assert majority control, which exists independently of any right of the corporation.

Id. at 15 (citations omitted). Applying this rule, the court found that the injury alleged – that the partnership received a lower amount of income – was to the partnership directly and only damaged the plaintiffs indirectly to the extent of their proportionate interest in the partnership. *Id*. at 16.

Defendant asserts that numerous courts (applying non-California law) have concluded that allegations of mismanagement, conversion and self-dealing may only be brought by limited partners as derivative claims, applying the rule articulated in *Litman*. *See Lenz*, 833 F. Supp. at 379-380; *Longo v. Butler Equities II*, 2000 WL 1835697 (N.Y.A.D.1 Dept.) (holding that breach of fiduciary duty claim based on allegation that principals of limited partnership had failed to collect on unsecured notes could only be brought as derivative claim because defendants' acts "could only have reduced the value of the partnership's investment in the target company, impacting on plaintiff only insofar as his pro-rata share was concerned"); *Jackson v. Marshall*, 537 S.E. 2d, 232, 235-236 (N.C. Ct. App. 2000) (holding that limited partner could only bring breach of fiduciary duty claim against general partner as derivative claim because all of the limited partners were affected equally by the general partner's actions); *Whalen v. Connelly*, 545 N.W. 2d 284, 292-293 (Iowa 1996) (holding that limited partner could only bring claim for breach of fiduciary duty against general partner as derivative claim where limited partner alleged that general partner had diverted partnership assets by paying itself a management fee that it did nothing to earn and using employees of the partnership in his own business without compensation to the partnership).

Finally, Defendant points to a case decided in New York state court. There, the court concluded, applying California law, that limited partners could not bring a claim against the general partners for breach of fiduciary duty because "the plaintiffs actually seek to recover funds belonging to the limited partnership." *In re Weksel*, 515 N.Y.S. 2d 568, 569 (1987). However, the court in that case provided few facts and almost no analysis in support of its holding.

3. Limited Partner's Right To Bring Derivative or Individual Claim Against General Partners Under California Law

These authorities – from California in the shareholder context and from other states in the limited partner context – support the proposition that claims for mismanagement and self-dealing that injure limited partners only indirectly through an injury to the partnership must be brought derivatively. However, Plaintiff asserts that California law allows limited partners to bring fiduciary duty claims either directly against general partners or as derivative claims, regardless of whether or not any special injury to the limited partner is alleged. Plaintiff cites § 16405(b) of the California Corporations Code and California cases that have allowed limited partners to bring breach of fiduciary duty claims directly. He further argues that the non-California cases applying corporate law to limited partnerships do not apply here because, under California law, the fiduciary duty owed by majority shareholders and corporate directors is more limited than the fiduciary duty owed by general partners to other partners. Finally, with respect to Plaintiff's claim alleging breach of the Partnership Agreement, Plaintiff asserts that he is entitled to bring this claim directly because the Partnership Agreement expressly required that DeBartolo obtain the consent of the limited partners before paying himself any compensation, thus giving rise to a contractual right.

a. California Corporations Code § 16405(b)

Plaintiff asserts that California Corporations Code § 16405(b) allows him to sue Defendant individually regardless of the nature of the injury alleged. Section 16405(b) provides as follows:

> (b) A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to do any of the following:
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> (1) Enforce the partner's rights under the partnership agreement.
>
> (2) Enforce the partner's rights under this chapter, including all of the following:
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> (A) The partner's rights under Section 16401, 16403, or 16404.
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> (B) The partner's right on dissociation to have the partner's interest in the partnership purchased pursuant to Section 16701 or 16701.5, or to enforce any other right under Article 6 (commencing with Section 16601) or 7 (commencing with Section 16701).

> (C) The partner's right to compel a dissolution and winding up of the partnership business under Section 16801 or enforce any other right under Article 8 (commencing with Section 16801).
>
> (3) Enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

Cal. Corp. Code § 16405(b). Section 16405(b) is part of the California Revised Uniform Partnership Act of 1994 ("CRUPA"). Although Plaintiff agrees that the Partnership is governed by the Uniform Limited Partnership Act ("ULPA"),[4] Plaintiff asserts that § 16405(b) applies to Plaintiff's claims in this action because of "gap-filling" provisions in the ULPA that incorporate provisions of the CRUPA where the ULPA is silent. In particular, Plaintiff points to California Corporations Code §§ 15509 and 15529. Section 15509 provides that "[a] general partner shall have all the rights and powers and be subject to all of the restrictions and liabilities of a partner in a partnership without limited partners." Section 15529 provides that "[i]n any case not provided for in this act, the rules of law and equity, including the law merchant, shall govern." *See also Bedolla v. Logan & Frazer*, 52 Cal.3d 118, 128 (1975) (holding that § 15529 incorporated pertinent provision of the Uniform Partnership Act into the Uniform Limited Partnership Act).

Plaintiff further argues that the CRUPA's express exclusion of limited partnerships from its definition of "partnership" was not intended to sever the link that has traditionally existed between limited partnership law and general partnership law. *See* Cal. Corp. Code § 16101(7).[5] In support of this position, Plaintiff points to the Prefatory Comment to the Revised Uniform Partnership Act ("RUPA"), which states as follows:

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[4] *See* Plaintiff's Supplemental Brief at 2, n. 3; Limited Partnership Agreement at ¶ 25; Uniform Limited Partnership Act (added by Stats. 1949, c. 383, p. 688, § 1).

[5] Section 16101(7) provides as follows:

> Partnership means an association of two or more persons to carry on as coowners a business for profit formed under section 16202, predecessor law, or comparable law of another jurisdiction, and includes, for all purposes for all purposes of the laws of this state, a registered limited liability partnership, *and excludes any partnership formed under Chapter 2, commencing with Section 15501 [ULPA]) or Chapter 3 (commencing with Section 15611 [RULPA]).*

Cal. Corp. Code § 16101(7) (emphasis added).

> Partnership law no longer governs limited partnerships pursuant to the provisions of RUPA itself. First, limited partnerships are not partnerships within the RUPA definition. Second, UPA Section 6(2), which provides that the UPA governs limited partnerships in cases not provided for in the [ULPA] has been deleted. *No substantive change in result is intended, however.* Section 1105 of the RULPA already provides that the UPA governs in any case not provided for in RUPA, and thus the express linkage in RUPA is unnecessary. Structurally, it is more appropriately left to RULPA to determine the applicability of RUPA to limited partnerships. It is contemplated that the Conference with review the linkage question carefully, although no changes in RULPA may be necessary despite the many changes in RUPA.

Uniform Partnership Act (amended 1997), Prefatory Note, 6 U.L.A. 5 (Master Ed. Supp. 2000) (emphasis added).[6]

Defendant asserts that the section of the Prefatory Note to the RUPA relied on by Plaintiff does not support his position because it pertains only to the definition of "partnership" as it existed in CRUPA prior to the 1999 amendment of CRUPA by the California legislature. Specifically, the CRUPA at the time of the Prefatory Note, like the uniform law to which the Prefatory Note related, *omitted* limited partnerships from the definition of "partnership" but *did not affirmatively exclude* limited partnerships from the definition. *See* Uniform Partnership Act (1994), 6 U.L.A. 10 (containing text of § 101 of uniform law, defining partnership under RUPA, and variations of adopting jurisdictions).[7] Prior to CRUPA's enactment, California's Uniform Partnership Act, as well as the uniform law on which it was based, the 1914 Uniform Partnership Act, expressly *included* limited partners in the definition of "partnership." *See* Uniform Partnership Act (1914), 6.

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[6] Section 15529 of the ULPA is substantively identical to § 1105 of the RULPA. *See* Cal. Corp. Code § 15529. Therefore, the fact that the Partnership in this action is governed by the ULPA rather than the RULPA has no bearing on the relevance that the Prefatory Note may or may not have to the issue here.

[7] Section 101 provides, in relevant part, as follows:

> In this [Act]:
>
> . . .
>
> (6) "Partnership" means an association of two or more persons to carry on as co-owners a business for profit formed under section 202, predecessor law, or comparable law of another jurisdiction.

§ 101 Uniform Partnership Act (amended 1997), 6 U.L.A. 35 (Master Ed. Supp. 2000).

U.L.A. 256-257 (containing text of § 6 of uniform law, defining "partnership" and California variation from official text of uniform law). Thus, the Prefatory Note stating that no change in the law was intended by the omission of limited partnerships from the definition indicates that in 1997, when the Note was drafted, the RUPA could still be used as a gap-filler for the ULPA.

However, Defendant asserts, this link was severed in 1999, when the CRUPA was amended by the California legislature to expressly exclude limited partners from the definition of partnership under the CRUPA. *See* Stats. 1999 c. 250 § 3. The Court agrees.

The Prefatory Note to the 1997 amendments to the RUPA[8], as well as scholarly commentary addressing the relationship between limited and general partnership law, reflects that at the time the CRUPA was enacted, in 1997, the question of linkage between the RUPA and the RULPA was a subject of debate. Although the RUPA did not explicitly sever the traditional link between general and limited partnership law, it did deviate from the UPA by omitting limit partners from the definition of partnership. According to the Prefatory Note, this change was not intended to sever the link between limited and general partnership law. Uniform Partnership Act (amended 1997), Prefatory Note, 6 U.L.A. 5 (Master Ed. Supp. 2000). However, it was envisioned that the National Conference of Commissioners on Uniform State Laws would "review the linkage question carefully" to determine whether or not the "many changes in RUPA" would require changes in RULPA. *Id.*; *see also* Alan W. Vestal, *A Comprehensive Uniform Limited Partnership Act? The Time Has Come*, 28 U.C. Davis L. Rev. 1195 (1995) (arguing that the adoption of the Revised Uniform Partnership Act of 1994 would lead to chaos in the law of limited partnership and advocating that limited partnership law be delinked from the RUPA by adopting a comprehensive uniform limited partnership act).

Further, the California legislature was aware when it adopted the CRUPA, in 1997, that some legal scholars believed the traditional linkage between limited partnership law and general partnership law was no longer appropriate in light of the significant changes in the law of general

[8] Although the Prefatory Note corresponds to the 1997 amended version of the RUPA of 1994, the definition of "partnership" in the amended RUPA was not changed from the original RUPA of 1994. In both versions, limited partnerships were omitted but were not expressly excluded from the definition.

partnership made under the RUPA. *See* June 7, 1996 Letter of James F. Fotenos to Senator Charles M. Calderon, Chair of the Senate Judiciary Committee (recommending that RUPA should not be linked to the law of limited partnership and asserting that "commentators from both sides of the spectrum agree that RUPA should not be linked to limited partnership acts"); *see also* California Assembly Judiciary Notes (1996) (noting that "eventually LPA [the ULPA and RULPA] should be severed from UPA and RUPA)[9], attached as Exh. C to Defendant's Appendix of Extra Judicial Authorities Filed In Support of Defendant Edward J. DeBartolo's Motion To Dismiss Or, In The Alternative, To Strike Allegations And Claims Of Partnership Mismanagement Pursuant To Fed. R. Civ. P. 12(b)(6) And/Or 12(f) ("Defendant's Appendix of Extra Judicial Authorities").

In 1999, the California legislature amended the CRUPA to explicitly exclude limited partnerships from the definition of partnership. In particular, the legislature amended the definition of "partnership" contained in California Corporations Code §16101(7) by adding the words, "and excludes any partnership formed under Chapter 2 (commencing with Section 15501) [the ULPA] and Chapter 3 (commencing with Section 15611) [California Revised Limited Partnership Act]."[10] Giving the language of the amendment its "usual and ordinary meaning," this amendment reflects a clear intent on the part of the legislature to delink the RUPA from limited partnership law so that the RUPA would no longer be used as a gap-filler for the ULPA and the RULPA. *See White v. Ultramar Inc.*, 21 Cal. 4th 563, 572 (1999) (holding that "[t]he statute's plain meaning controls the court's interpretation unless its words are ambiguous" and that "if the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent"). Such a reading of the 1999 amendment is also consistent with the principle of statutory construction that statutes should not be construed to render them "mere surplusage." *See Piombo v. Board of Retirement of San Mateo County,* 214 Cal. App.3d 329, 334-335 (1989) (reading of amendment that rendered it mere surplusage violated canons of statutory construction). The 1999 Amendment would

[9] Although it is not clear who took these notes, the comment concerning delinking limited partnership law from general partnership law appears to have been a recommendation made by Professor Mel Eisenberg in a presentation before the Assembly Judiciary Committee.

[10] *See* footnote 5, *supra*, for full text of § 16101(7), as amended.

result in no change in the law if it were read – as Plaintiff argues it should be – to preserve the linkage between the CRUPA as originally enacted and limited partnership law, thus rendering the 1999 amendment a meaningless act by the California legislature. *See id.*; *see also White*, 21 Cal. 4th at 572, (noting that "when the legislature amends a statute, we presume it was aware of the prior judicial construction). The Court declines to adopt such a construction of the 1999 amendment and therefore rejects Plaintiff's assertion that § 16405(b) is incorporated into the ULPA and the RULPA by virtue of those statutes'gap-filling provisions.

The single case cited by Plaintiff in support of his argument that § 16405(b) applies to limited partners under the ULPA, *Koros v. Doctors' Special Surgery Center of Jacksonville*, 717 So.2d 137 (1998) does not support Plaintiff's position. In that case, a limited partner was not permitted to sue general partners in the limited partnership because the limited partner had not first sought an accounting of the affairs of the partnership. *Id*. at 138. The court noted in a footnote that the RUPA, which recently had been adopted in Florida, dispensed with the requirement that a partner must seek an accounting before bringing an action related to partnership business, instead allowing partners to sue "with or without an accounting" under § 405(b). *Id*. at 138, n. 2. However, the court concluded that the RUPA did not apply because it was adopted after the plaintiff's claims had been dismissed. *Id*. Although the court did not reach the issue, the court assumed, without explicitly stating as much, that § 405(b), which is virtually identical to California Corporations Code § 16405(b), applied to claims by a limited partner against general partners.

Koros is distinguishable from the facts here because Florida law, in contrast to California law in the wake of the 1999 amendment discussed above, omits but does not exclude limited partners from the definition of "partnership." *See* Fla. Stat. Ann. § 620.8101. Rather, the Florida legislature adopted the definition of partnership contained in the RUPA of 1994, to which the 1997 Prefatory Note applies. As discussed above, the RUPA of 1994 preserved the linkage between general and limited partnership law. In the absence of an amendment by the Florida legislature "delinking" the two bodies of law, the *Koros* court may have been correct in assuming that the RUPA may be

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applied as a gap-filler for limited partnership law. That is not the case, however, under California law.[11]

Finally, the Court rejects the assertion that the ULPA is silent as to whether a limited partner may sue individually to redress injuries to the partnership. The fundamental policy expressed in the ULPA confining conduct of the business of the enterprise to the general partners – and the requirement of a demand before suing in the name of the partnership – are only consistent with a rule that *requires* that claims based on direct injury to the partnership (and only incidental to the partners) be brought derivatively. First, this Court has already held that a derivative suit is available to limited partners. One predicate to such a suit is that the limited partners comply with the demand requirements of Fed.R.Civ.P. 23.1 and California law. The purpose of the demand requirement for derivative claims is to ensure that the partnership is given the opportunity to exercise its business judgment in deciding whether or not to proceed with an action. *See County National Bank v. Mayer*, 788 F. Supp. 1136, 1140 (C.D. Cal. 1992). Were we to hold that a partner may chose whether to bring a claim directly or derivatively – even though the only direct injury is to the partnership – the demand rule and its protection of the exercise of business judgment by the managers of the partnership could be circumvented.

Moreover, the ULPA contains a provision that addresses, albeit in a manner that is somewhat confusing, the right of limited partners to sue. *See* Cal. Corp. Code § 15526. In *Wallner v. Parry Professional Building*, the court held that § 15526 allows limited partners to bring derivative actions but did not address whether limited partners could bring individual claims under that section. 22 Cal. App. 4th 1446, 1454 (1994). Although *Wallner* does not explicitly state that a limited partner may *only* bring derivative claims to redress injuries to the partnership under § 15526, the reasoning of *Wallner* supports that conclusion.

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[11] Neither do the out-of-jurisdiction cases cited by Defendant involving actions by limited partners offer any significant guidance on this issue because they were either decided before RUPA was adopted or apply the law of a non-RUPA jurisdiction. *See, e.g., Litman*, 611 A.2d 12 (Del. Ch. 1992) (decided before RUPA adopted); *Lenz*, 833 F. Supp. 362, 368 (S.D.N.Y. 1993) (non-RUPA jurisdiction); *Energy Investor's Fund LP v. Metric Constructors, Inc.*, 525 S.E. 2d 441, 444 (N.C. 2000) (non-RUPA jurisdiction); *The Northern Trust Co. v. VIII South Michigan Associates*, 657 N.E. 2d 1095 (Ill. App. Ct. 1995) (non-RUPA jurisdiction); *Partnership Equities Inc. v. Marten*, 443 N.E. 2d 134, 137-138 (Mass. Ct. App. 1982) (non-RUPA jurisdiction); *Strain v. Seven Hills Assoc., LP*, 429 N.Y.S. 2d 424, 431-432 (non-RUPA jurisdiction).

In *Wallner*, the court addressed the question of whether California Corporations Code § 15526 prohibited a limited partner from bringing derivative claims of self-dealing and breach of fiduciary duty against several general partners.[12] 22 Cal. App. 4th 1446. The defendants asserted that § 15526 prohibited the limited partner from bringing a derivative claim against the general partners. *Id.* at 1449. The court rejected the defendants' assertion, finding that § 15526 does "not have to be read as saying that a limited partner cannot bring an action on behalf of the partnership when the general partners have disabled themselves or wrongfully refused." *Id.* at 1452-1453 (citation omitted). Rather, the court held, "the basic purposes of section 15526 is served if a limited partner has a right to file a derivative action on behalf of the limited partnership." *Id.* Drawing on a case that construed a similar provision under New York law, the court explained:

> As the Riviera Congress court stated, " . . .we believe that the purpose of the statute . . . is solely to restrain limited partners from interfering with the right of the general partners to carry on the business of the partnership. The basis for this lawsuit is that the general partners have declined to carry on the business of the partnership by wrongfully refusing to enforce a partnership claim for rent against a former tenant." (*Riviera Congress Associates v. Yassky*, . . . 277 N.Y.S.2d at p. 391 . . . Since the purpose of Wallner's suit is to collect debts owing to the partnership which the general partners refuse to collect because of alleged self-dealing, this action does not, on its face, purport to interfere with the general partners' right to carry on the business.

Id. at 1453.

Plaintiff asserts that "nothing in *Wallner* suggests that a derivative action is the only avenue available to a limited partner." Opposition at 7 fn. 6. The Court disagrees. While *Wallner* does not directly state that a limited partner may not sue the partnership as an individual under § 15526, the reasoning of *Wallner* supports the conclusion that, at least where a limited partner seeks to bring claims based on rights that belong to the partnership, § 15526 requires that such claims must be

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[12] Section 15526 provides as follows:

> A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership.

Cal. Corp. Code § 15526.

brought as derivative claims. In particular, in *Wallner*, the court concluded that the derivative claims did not interfere with the conduct of partnership business because the partnership had "*wrongfully refused*" to enforce partnership claims. *Id.* at 1453. The court in *Wallner*, thus, assumed, because the claims at issue were derivative, that the plaintiff had made a demand on the partnership, as is required under Fed. R. Civ. P. 23.1 and California law. As numerous California courts have explained, the purpose of the demand requirement for derivative claims is to ensure that the corporation is given the opportunity to exercise its business judgment in deciding whether or not to proceed with an action. *See Country National Bank v. Mayer*, 788 F. Supp. 1136, 1140 (E.D. Cal. 1992).

Given the court's concern in *Wallner* with the potential interference with the conduct of business that might result from actions by limited partners, this Court questions Plaintiff's assertion that § 15526 is silent as to whether and when a limited partner may bring individual claims against a general partner. Rather, § 15526 must be read in light of the basic principle of limited partnership law that limited partners generally are not to be involved in the conduct of the business. Indeed, numerous provisions in the ULPA make clear that the rights of limited partners to become involved in the business of the partnership are limited. *See, e.g.,* Cal. Corp. Code § 15507 (providing that limited partner loses protection from liability generally afforded limited partners if he "takes part in the control of the business"); Cal. Corp. Code § 15510 (providing that limited partners shall have the right to inspect the books of the partnership, to have on demand full and complete information about partnership affairs, including a formal accounting, to have dissolution and winding up by decree of the court, and to receive a share of the profits); Cal. Corp. Code § 15526 (providing that a limited partner is not a proper party to proceedings by or against partnership except where object is to enforce a limited partner's right against or liability to the partnership). Therefore, this Court construes § 15526 as requiring that claims alleging injury to a limited partner that is incidental to injury to the partnership as a whole, where there is no special injury independent of the injury to the partnership, may be brought as derivative claims only.

Such a reading of § 15526 is supported by the comment to the ULPA, which explains that courts interpreting the Uniform Limited Partnership Act assume two principles as fundamental:

> First: That a limited . . . partner is a partner in all respects like any other partners, except that to obtain the privilege of a limitation on his liability, he has conformed to the statutory requirements in respect to filing a certificate and *refraining from participation in the conduct of the business*.
>
> Second: The limited partner on any failure to follow the requirements in regard to the certificate or any participation in the conduct of his business, loses his privilege of limited liability, and becomes, as far as those dealings with the business are concerned, in all respects a partner.

Comment, Uniform Limited Partnership Act (1916), 6A U.L.A. 312 (1995) (emphasis added). Were § 15526 construed to allow limited partners to assert individual claims against general partners based on injuries that are incidental to injuries to the partnership as a whole, without first meeting the demand requirement for derivative claims, the basic principles of the ULPA would be undermined. Rather than "restrain[ing] limited partners from interfering with the right of the general partners to carry on the business of the partnership," such a construction of § 15526 would allow limited partners to take on claims that belong to the partnership without first affording the partnership the opportunity to exercise its business judgment or presenting specific facts showing that a demand on the partnership would have been futile. Such a result would be contrary to the fundamental principles underlying the Uniform Limited Partnership Act and would contradict the reasoning in *Wallner*.

b. Duties Owed To Shareholders And Limited Partners Under California Law

Plaintiff further argues that the non-California cases analogizing actions by limited partners to shareholder actions against corporations are not applicable because the duty of a general partner under California law is broader than that of majority shareholders. This argument is irrelevant to the analysis here in that it fails to address the crucial question raised by Defendant's Motion, that is, who holds the right to sue for breach of the duty – the partnership or the limited partners as individuals – whatever the scope of the duty. Moreover, Plaintiff's argument concerning the scope of duty of general partners is not supported by authority. Plaintiff cites to *Jones v. Ahmanson & Co.* for the proposition that the duty of majority shareholders to the minority is "limited" to the duty not to "use power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority." 1 Cal. 3d 93, 108 (1969); Opposition at 8. In contrast, Plaintiff asserts, the duty of a general partner is the "much more sweeping" duty to act as a "trustee" and to act in the "highest good faith" with regard to all partnership business. Opposition at 8 (citing to *BT-I v. Equitable Life Assurance Society*, 75 Cal. App. 4th 106, 1410-1411 (199). However, neither *Jones* nor *BT-I* addresses the scope of the fiduciary duty owed by majority shareholders as compared to that owed by a general partner. Further, Plaintiff's quote from *Jones* does not represent the full scope of the majority shareholders' fiduciary duty as described in more detail by the court in that case:

> The extensive reach of the duty of controlling shareholders and directors to the corporation and its other shareholders was described by the court of appeal in *Remillard Brick Co. v. Remillard-Dandini Co.* . . . . where . . . the court held: "A director is a fiduciary. . . . So is a dominant or controlling stockholder or group of stockholders . . . . . *Their powers are powers of trust*. . . . Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder *not only to prove the good faith* of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. . ."

1 Cal. 3d at 108 (citations omitted) (emphasis added). Given the "extensive duty" of majority shareholders and directors described in *Jones,* Plaintiff's argument that this duty is more limited than the duty of general partners under California law is unconvincing.

c. California Cases Allowing Limited Partners To Bring Individual Claims Against General Partners

Plaintiff also cites a number of cases which he argues support the proposition that a limited partner may bring a fiduciary duty claim against a general partner either individually or as a derivative claim. *See* Opposition at 6-7 (citing to *BT-I*, 75 Cal. ¶. 4th 1406 (1999); *Kazanjian v. Ranch Estates Ltd.*, 235 Cal. App. 3d 1621 (1991)*; Broffman v. Newman*, 213 Cal. App. 3d 252 (1989); *Prince v. Harting*, 177 Cal. App. 2d (1960); *Laughlin v. Haberfelde*, 72 Cal. App. 2d 780 (1946); *In re Angeles*, 177 B.R. 920 (C.D. Cal. Bankr. 1995)). However, none of these cases supports the proposition that limited partners can bring claims against general partners either as derivative claims or individually, without regard to whether the injury alleged is to the partnership directly or some special injury. Further, to the extent that any of these cases might be read to support this proposition, the Court declines to follow these cases because none of them suggests that the courts considered the issue raised here, namely, whether or not a limited partner may sue individually based on injuries to the partnership or, alternatively, whether a limited partner can only bring such claims as derivative claims.

In *Broffman*, a limited partner sued a general partner directly for breach of a provision in the partnership agreement forbidding any compensation for services provided. 213 Cal. App. 3d at 255. Although the limited partner was allowed to bring individual claims for breach of contract and breach of fiduciary duty, the court of appeal did not address the question of whether these claims should have been brought as derivative claims. Rather, the court stated that any challenge by the defendant to the plaintiff's capacity and standing to sue had been waived by the plaintiff's failure to raise the issue below. *Id.* at 257. In fact, the standing question alluded to by the court appears to have been whether the plaintiff's remedy was an action for dissolution and accounting. There is no indication that the court even considered the issue of whether the claims should have been brought as derivative claims.

In *BTI*, the court of appeal allowed a limited partner to sue a general partner for breach of fiduciary duty based on the general partner's purchase and foreclosure of a deed of trust on the partnership's sole asset. 75 Cal. App. 4th at 1408. As in *Broffman*, though, the court failed to analyze the issue of whether the claims were properly brought as individual claims or, alternatively, whether the claims should have been brought as derivative claims.

In *Kazanjian v. Ranch Estates*, 235 Cal. App. 3d 1621 (1991), the limited partner sued one of two general partners for misappropriation of partnership funds where, under the partnership agreement, the limited partner was upon dissolution to recover the equity in the real estate that he had contributed to the partnership prior to distribution of the remaining proceeds. *Id.* at 1624. Because one of the general partners misappropriated partnership funds, the limited partner did not recover his equity in the real estate and sued both general partners, arguing that they were jointly and severally liable to him. *Id.* at 1625. Although the court rejected the argument that the second general partner (who had not misappropriated funds) was jointly and severally liable, it did not question the right of the limited partner to sue the first general partner (who had misappropriated funds) individually. *Id*. This is consistent with Defendant's position, however, because the limited partner suffered a unique injury by virtue of the fact that he was entitled to recover his equity *before* any distributions were made to the partners. Once again, the court did not address the issue of whether the plaintiff's claims should have been brought as derivative claims.

Plaintiff also relies on *Prince v. Harting*, 177 Cal. App. 2d (1960) and *Laughlin v. Haberfelde*, 72 Cal. App. 2d 780 (1946). These cases involved actions by general partners against general partners and, therefore, have no bearing on the issue here, namely, the circumstances under which a limited partner may bring individual claims against a general partner under California law.

Finally, although *In re Angeles* appears to support Plaintiff's position, this case was probably wrongly decided because the court apparently relied on the law of general partnership rather than that governing limited partnership without providing any justification for doing so. *See In re Granite Partners, L.P.*, 208 B.R. 332, 344 n. 16 (Bankr. S.D.N.Y. 1997) (concluding that court in *In re Angeles* misapplied California law by applying a rule from general partnership law in the context of limited partnership).

4. Individual Claims By Limited Partners Based On Contractual Rights

Plaintiff also argues that he is entitled to bring his claim for breach of the partnership agreement (Claim Two) individually because that claim is based upon a contractual right, namely, section 11.1.5 of the Partnership Agreement, which provides that the partners shall agree in advance on any compensation paid to the general partner. Opposition at 4. Defendant, on the other hand, asserts that even where a claim involves a breach of contract, if the injury is to the partnership first, the claim must be brought as a derivative claim. The Court agrees.

In *Moran v. Household Int'l Inc.*, 490 A.2d 1059, 1070 (Del. Ch. Ct. 1985), the court articulated a two-part test for determining whether or not a claim is derivative or can be brought individually: to set out an individual action, "the plaintiff must allege either 'an injury which is separate and distinct from that suffered by other shareholders,' ... or a wrong involving a contractual right of a shareholder, such as the right to vote, or to assert majority control, which exists independently of any right of the corporation." *Lipton v. News Int'l*, 514 A.2d 1075, 1078 (Del. 1986) (quoting *Moran*, 490 A.2d at 1070). While the second prong of the *Moran* test might be read to allow a limited partner to sue individually for any breach of the partnership agreement, courts have rejected such a literal reading of *Moran* as inconsistent with the policy underlying direct and derivative actions. *See Ionosphere Clubs Inc. v. American National Bank & Trust Company of Chicago*, 17 F.3d 600, 605 (2d Cir. 1994). Rather, in determining whether or not a claim is direct or derivative, regardless of which prong of *Moran* is being applied, the Court must "look ultimately to whether the plaintiff has alleged special injury." *Lipton v. News International*, 514 A.2d 1075, 1078 (1986).

As the court explained in *Ionosphere*:

> The distinction between derivative and direct claims turns primarily on whether the breach of duty is to the corporation or the shareholder(s) and whether it is the corporation or the shareholder(s) that should appropriately receive relief.

17 F.3d at 1605. Applying this rule, stockholders have a direct cause of action "where third parties contrived to destroy or circumvent the participatory or commercial rights of certain stockholders in a manner that does no injury to the corporation, as where directors contrived to exclude certain stockholders from voting, or from participating in an advantageous offer." *Id* at 1605-1606. Under these circumstances, relief to the corporation would not cure the wrong because the corporation has not been injured. *Id*. On the other hand, claims are derivative, even if they are based on a contractual right, if it is the corporation (or the partnership) that is injured. *See Golden Tee v. Venture Golf Schools, Inc.*, 333 Ark. 253, 261 (stating that "[a]ctions for breach of the partnership agreement may be brought as individual actions or partnership actions, depending on which entity or party is primarily injured," citing to 4 Bromberg and Ribstein on Partnership, § 1504(h)).

Here, the injury alleged as a result of Defendant's breach of the Partnership Agreement, to the extent this claim is based on alleged mismanagement, conversion and self-dealing, is directly to the partnership. It is the Partnership that will be entitled to relief if Plaintiff's claim is proven. *See Busick v. Stoezl*, 264 Cal. App. 2d 736, 737-738 (1968) (affirming district court order requiring managing partner to reimburse partnership for management fees that were paid without the consent of plaintiff limited partner, in violation of partnership agreement). Therefore, Plaintiff does not have standing to bring this claim individually to the extent that it is based on allegations of partnership mismanagement, conversion and self-dealing.

B. Claim For Accounting

Defendant asserts that Plaintiff's claim for an accounting is derivative because the underlying claims on which the accounting claim is based are derivative. Defendant further asserts that an accounting is not necessary to protect Plaintiff's tag-along rights and therefore, that Defendant's claim for an accounting should be dismissed. The Court declines to dismiss Plaintiff's claim for an accounting at this stage in the proceeding. On a motion to dismiss, the Court must rely on the allegations contained in the Complaint and on the documents attached to or referenced in the Complaint. It is not evident to the Court from the face of the Complaint that an accounting is unnecessary to protect Plaintiff's tag-along rights.

C. Business and Professions Code Claim

Plaintiff's claim for violation of § 17200 of the California Business and Professions Code is predicated on the remaining claims in the case. For the reasons stated above, Plaintiff does not have standing to pursue this claim to the extent that it is based on Plaintiff's allegations of mismanagement, conversion and self-dealing.

IV. CONCLUSION

Defendant's Motion To Dismiss, Or In The Alternative, To Strike Allegations And Claims Of Partnership Mismanagement Pursuant To Fed. R. Civ. P. 12(b)(6) And/Or 12(f) is GRANTED in part as follows: all allegations of mismanagement, conversion and self-dealing shall be struck from the Second Amended Complaint. Specifically, the following allegations shall be struck:

1. Paragraphs 11-14 (all);
2. Paragraph 25, beginning at line 11 with the words "and (3) . . ." to the end of the paragraph;

3. Paragraph 26, beginning at line 15 with the words "and (2) . . ." to the end of the paragraph.

4 Paragraph 30, first sentence;

5. Paragraph 31 (all); and

6. Paragraph 35, beginning at line 10 with the words "depriving him of partnership distributions" and ending on line 11 with the words "interest in the Partnership."

Defendant's Motion is DENIED with respect to Claim Four, for an accounting.

IT IS SO ORDERED.

Dated: May 7, 2001

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JOSEPH C. SPERO
United States Magistrate Judge